IN THE

Appellate Court of Illinois

FIRST DISTRICT.

APRIL TERM, A. D. 1955.

BENNET BOTSFORD YOUNG, *Petitioner-Appellee,* *vs.* THE LAKE DEARBORN CORPORATION, etc., et al., *Defendants.*	Appeal from the Circuit Court of Cook County.
KATHERIEN W. BRADLEY, et al., *Petitioners-Appellees,* *vs.* THE LAKE DEARBORN CORPORATION, etc., et al., *Defendants.*	Transfer from Appeal taken to Supreme Court of the State of Illinois.
On appeal of EVELYN PRATT ELLITHORPE.	

PETITION FOR REHEARING.

Within the time allowed by Rule 14, Evelyn Pratt Ellithorpe protests and objects to all action taken by the Court October 31, 1955. She presents her Petition and respectfully states:

A. By its abstract statements and sweeping conclusions, the Opinion by Appellate Court shows forth an absence of due process under the constitution of Illinois and of the United States. The Opinion demonstrates a complete departure from the normal and usual procedure. The Stat-

utes of Illinois provide for an Opinion on review, setting forth concrete reasons for the ruling made by the Court. Chapter 37—Courts, paragraphs 41 and 66. *People* v. *Hassakis*, 6 Ill. 2d, 129 N. E. 2d 9 at 10 ff. In the case at bar, the Supreme Court of Illinois filed no Opinion at all to support the order for transfer. The Opinion by the Appellate Court is more abstract than the record which was denounced for brevity by the Supreme Court of Illinois in the case of *Hassakis*. The Appellate Opinion is judicial assertion without analysis. Thereby Petitioner has been denied equal application of law and equal protection of law, as required by statutes and the Constitutions.

B. The Appellate Court fails and refuses to pass upon any of the constitutional issues which were presented by the record and the briefs. Thereby the Opinion and the affirmance of decrees, ignore the rights of Petitioner, and ignore the positive duty of the Appellate Court, as provided by the supremacy clause at Article VI of the Constitution of the United States.

C. The cryptic Opinion and affirmance of decrees, create a new issue of constitutional law, because such action is a failure to prepare the record by Opinion, for review before the Supreme Court of the United States of America, pursuant to the duty of Appellate Court, under said supremacy clause and under all statutes and rules pursuant thereto.

D. The Opinion and affirmance of decrees, overlook and disregard substantial points presented by the record and briefs, and decide the appeals contrary to the record and the briefs.

E. The Opinion and affirmance of decrees, overlook basic rights of Petitioner, created by the statutes of limitation of Illinois, which statutes are mentioned and applicable to the situation shown by the record (see brief 20 and reply 9). Such Appellate Court action also is con-

trary to recent Court ruling upon companion limitation statute of Illinois. See *Livingston* v. *Myers*, 6 Ill. 2d 325 at 336, 196 N. E. 2d 12.

F. Said Opinion and affirmance of decrees, create another issue of constitutional law, when the Appellate Court asserts power of judicial notice, contrary to statutory legislation, which forbids any form of evidence more than seventy-five years old. See briefs pages 21-22 and reply page 10. Thereby equal administration of law has been denied to Petitioner.

WHEREFORE, Petitioner asks for rehearing and further proceedings under constitutions and the statutes.

Respectfully submitted,

WEIGHTSTILL WOODS,
53 West Jackson Blvd.,
Chicago 4, Illinois,
Attorney of Record.

APPENDIX D.

Constitution of the United States.

Amendment 14, section 1—

"nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Amendment 9—

"The enumeration in the constitution, of certain rights, shall not be construed to deny or disparage others retained by the people".

Constitution of Illinois

Article II bill of rights—

Section 2—"No person shall be deprived of life, liberty or property without due process of law".

Section 19—"Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation: he ought to obtain, by law, right and justice freely, and without being obliged to purchase it, completely and without denial, promptly, without delay."

Article VI—Courts—Paragraph 29—general provisions:

"All laws relating to courts shall be general, and of uniform operation: and the organization, jurisdiction, powers, proceedings and practice of all courts, of the same class or grade, so far as regulated by law, and the force and effect of the process, judgments and decrees of such courts, severally, shall be uniform."

JUN 26 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1956.

No. [redacted]148

KATHERINE W. BRADLEY and Others,
Trial Court Petitioners,
Respondent here,
and
BENNET BOTSFORD YOUNG,
Trial Court Petitioner,
Respondent here,
vs.
Lake Dearborn Corporation and Others,
Trial Court Defendants,
Respondent here.

Appeal from the Circuit Court of Cook County.

Burnt Record Proceedings.

Petition for Certiorari.

BRIEF OF GUARDIAN AD LITEM IN OPPOSITION TO THE PETITION FOR CERTIORARI.

SARSFIELD COLLINS
Guardian Ad Litem
30 N. La Salle Street
Chicago 2, Illinois

UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL., LAKEVIEW 5-6551

INDEX.

PAGE

Opinion Below 1

Jurisdiction 2

Question Presented 2

Statement of the Case 2

Summary of Argument 3

ARGUMENT.

I.

No Substantial Federal Question Involved 4

TABLE OF AUTHORITIES.

Cases.

Drivers Union v. Meadowmoor, 312 U.S. 287, 296 4

Loeber v. Schroeder, 149 U.S., 580-585 5

Northern Pacific Railroad v. Patterson, 154 U.S. 130, 134 6

Williams v. Kaiser, 323 U.S. 471, 481 7

Statutes.

Sec. 15 of the Act. Ill. Rev. Stat. 1953, Chap. 116, Sec. 19 6

Sec. 16 of the Act. Ill. Rev. Stat. 1953, Chap. 116, Sec. 20 3

In The

Supreme Court of the United States

October Term, A. D. 1956.

No. 1013

KATHERINE W. BRADLEY and Others, *Trial Court Petitioners, Respondent here,* and **BENNET BOTSFORD YOUNG,** *Trial Court Petitioner, Respondent here,* vs. **Lake Dearborn Corporation and Others,** *Trial Court Defendants, Respondent here.*	Appeal from the Circuit Court of Cook County. — Burnt Record Proceedings. — Petition for Certiorari.

BRIEF OF GUARDIAN AD LITEM IN OPPOSITION TO THE PETITION FOR CERTIORARI.

OPINION BELOW

The opinion of the Appellate Court of Illinois, First District, filed October 31, 1955, appears at (Abst. 233).

The petition for rehearing and the order of November 16, 1955, denying it appear at (Abst. 233).

The Illinois Supreme Court on March 15, 1956 denied petition for leave to appeal, page 58 of Appendix A of Petition for Certiorari.

JURISDICTION

Petitioner seeks to invoke jurisdiction of this Court pursuant to Section 1257 (3) of the Federal Civil Code and Rule 19 of the Rules of the United States Supreme Court.

QUESTION PRESENTED

The question presented is whether there is involved in the instant case a substantial Federal question.

STATEMENT OF THE CASE

Petitioner requests a writ of certiorari to review the decision of the Appellate Court of Illinois, First District, affirming the decrees entered by the lower court.

The affirmance by the Appellate Court rested upon,

(A) failure and refusal of petitioner to file any pleading denying the facts alleged in the petitions in the Burnt Record cases.

(B) failure and refusal of petitioner to file in proceedings below any pleading presenting to the lower court a right, title, interest or claim, that court under the provisions of the Burnt Record Statute could then have taken jurisdiction of.

Two separate petitions to establish and confirm title to real estate had been filed in the Circuit Court of Cook County, Illinois under the Burnt Record Statute, Ill. Rev. Stats. 1953, Chap. 116.

Petitioner was named a party defendant therein and was duly served with summons. Under the provisions of the Burnt Record Statute it was the duty of petitioner, who

was named a defendant and served with process, to appear and establish by competent evidence whatever claims petitioner had to the real estate involved in the proceedings.

Petitioner failed to assume this duty and under the statute, the decrees entered were final and conclusive as to petitioner. Sec. 16 of the Act. Ill. Rev. Stat. 1953, Chap. 116, Sec. 20.

In the proceedings in the Circuit Court, petitioner filed a series of pleadings consisting, among others, of a plea in Bar, a plea of the Statute of Limitations and a plea of Laches. (Bradley Abst. 37-42-45). None of these pleas stated a defense to the actions and upon motion were stricken. At long last, petitioner filed a pleading identified as "Suggestions as to the dissolution of Lake Dearborn Corporation." (Bradley Abst. 53).

This last pleading, was, on motion, ordered (Bradley Abst. 54) to stand as petitioner's answer to the petitions.

Thereafter, hearings were had before a Master and the Chancellor.

Decrees were entered in each of the Burnt Record cases and each decree specifically provided (Bradley Abst. 133) that any lien or claim for liens which petitioner had against the real estate therein involved were not to be affected.

SUMMARY OF ARGUMENT.

The only question presented is whether there is involved in the instant case a substantial Federal question.

ARGUMENT.

I.

The only point raised in the petition is whether there is involved in the instant case a substantial Federal question.

It is conceded that actions under the Burnt Record Statute are special statutory proceedings and if the provisions of that statute were complied with, the decrees herein were properly entered.

Petitioner complains of the failure to name the stockholders or creditors of Lake Dearborn Corporation as parties to the proceedings, although none of them were proper and necessary parties and no one of them had any interest in the real estate described in the Petitions, which could under the Burnt Record Statute have been adjudicated in this action. The failure to name these parties did not evade any constitutional guarantee reserved to this petitioner. State practice and procedure forbid naming them parties in these proceedings. This Court has held "But we do not have revisory power over state practice, provided such practice is not used to evade constitutional guarantees."

Drivers Union v. *Meadowmoor,* 312 U.S. 287 at 296.

Under Illinois State practice and procedure and under the provisions of the Burnt Record Statute, petitioner, and others similarly situated, who have been named and served with process as defendants, are granted the right to appear, to plead and to prove any claim other than lien claims, they have against the real estate described in the Burnt Record petitions.

This exclusion of claims for liens in proceedings had under the Burnt Record Statute does not leave petitioner and others similarly situated, without remedy.

Lien claims, claims for an accounting or for partition are, under Illinois Law, to be presented in the forum designated by law for their presentation.

This forum, in Cook County, Illinois, is the Circuit or Superior Court of the County, and no Bar is there raised against such claims if they not be urged or asserted in proceedings had under the Burnt Record Act.

Petitioner has pending, a suit in the Superior Court of Cook County, Illinois against respondents for partition, accounting and other relief. (Abst. 212-228)

Petitioner ought not be heard to complain that serious Federal and constitutional questions are now presented because the subject matter of the Superior Court suit should have been allowed to have been asserted and proven in the Burnt Record cases.

This limitation of the right to assert a claim for a lien in a Burnt Record proceeding does not deprive petitioner as claimed, of due process, equal protection of the laws, uniformity of laws and equal administration of the laws and it is not in conflict with any provision of either the Federal or State Constitutions. Petitioner's contentions are in these respects without merit.

In *Loeber* v. *Schroeder,* 149 U.S., p. 580 at page 585, this Court stated:

> "The provisions of the Statute complained of by Plaintiff in Error are manifestly not in conflict with any provision of the Constitution of the United States, or of any law of Congress passed in pursuance thereof.

> The said statute relates to a matter of state practice alone, and the proper construction of that statute, upon well settled principles rested with the State Courts."

In *Northern Pacific Railroad* v. *Patterson,* 154 U.S., p. 130 at page 134, this Court held:

> "But it was for the Supreme Court of Montana to determine whether the Statute was exclusive and whether plaintiff came within its terms or not, and its action in that regard raises no Federal question for our consideration."

The question before the Appellate Court was whether the trial court had ruled correctly in holding that in a proceeding under the Burnt Record Statute to confirm and establish title to certain real estate, a claim for a lien could not be asserted or proven.

In sustaining the decrees, the Appellate Court was merely following the command of Section 15 of the Burnt Record Act, Illinois Revised Statutes, 1953, Chap. 116, Section 19, which reads:

> "But said decree shall not in anywise affect any lien or liens to which said fee may be subject and which have been created since the destruction of such records, whether the same be by mortgage, deed of trust, judgment, statutes, mechanic's lien or otherwise, but shall leave all such liens to be ascertained or established in some other proceeding or to be enforced as the parties holding them may see fit."

Consideration by the Appellate Court of this section of the statute and its approval of the same does not present a question of Federal Law. State Law only was involved.

In *Williams* v. *Kaiser*, 323 U.S. p. 471, at page 481, this Court stated:

> "In cases coming here from the State Courts, this Court has no power to pass on questions of State law, it can review a State Court decision only in so far as that raises a question of Federal Law and it can then only pass on the Federal question if a decision on the Federal law was necessary for the judgment rendered by the State Court."

This respondent prays that the petition for a writ be denied.

Respectfully submitted,

SARSFIELD COLLINS,
Guardian Ad Litem.

JUN 27 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1956.

No. 148

EVELYN PRATT ELLITHORPE,
Petitioner,

vs.

BENNET BOTSFORD YOUNG,
Respondent,

and

KATHERINE W. BRADLEY, et al.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

J. F. DAMMANN,
W. S. BODMAN,
120 W. Adams Street,
Chicago 3, Illinois,
Attorneys for Respondents.

WILSON & McILVAINE,
120 West Adams Street,
Chicago 3, Illinois,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

INDEX.

	PAGE
Preliminary Statement	1
Statement of Case	3
No Federal Question Involved	8
Refutation of Petitioner's Argument	8
Conclusion	16

List of Authorities.

Constitution of the United States, Amendments 9 and 14 3

Statutes.

Appellate Court Act of Illinois, Illinois Revised Statutes 1955, Chap. 37, § 66 2

Burnt Record Act of Illinois, Illinois Revised Statutes 1955, Chap. 116, §§ 5-28 ..... 2, 4, 9

Civil Practice Act of Illinois as to transfer of appeals, Illinois Revised Statutes 1955, Chap. 110, § 86 14

Seventy-five Year Limitation Act of Illinois, Illinois Revised Statutes 1955, Chap. 83, § 10a 12

Cases.

Bradley v. Lake Dearborn, 7 Ill. App. 2d 440, 129 N. E. 2d 578 3

Gormley v. Clark, 134 U. S. 338 (1889) 5

O'Brien v. Wheelock, 184 U. S. 450 (1902) 12

Pullman Car and Mfg. Co. v. Stroh, 349 Ill. 492 (1932) 15

Stoll v. Gottlieb, 305 U. S. 165 (1938) 11

Whitney v. Fox, 166 U. S. 637 (1897) 12

Young v. Lake Dearborn Corporation, 7 Ill. App. 2d 440, 129 N. E. 2d 578 3

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1956.

No. 148.

EVELYN PRATT ELLITHORPE,
Petitioner,

vs.

BENNET BOTSFORD YOUNG,
Respondent,

and

KATHERINE W. BRADLEY, et al.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

PRELIMINARY STATEMENT.

Respondent Young and the several respondents Bradley to the petition for writ of certiorari were the petitioners in two separate suits originally filed in the Circuit Court of Cook County to establish and confirm the title to separate tracts of real estate owned by respondents Young and Bradley, respectively. These suits were brought under an Illinois statute generally referred to as the Burnt

Record Act of Illinois (Illinois Revised Statutes 1955, Chap. 116 §§ 5-28). The cases are herein referred to as the *Young* case and the *Bradley* case. The only respondent named in the petitions who opposed the allowance of the relief prayed was the petitioner here, Mrs. Evelyn Pratt Ellithorpe, who was a party to both petitions. She was made a party because she had recorded a self-serving instrument which she called a "caveat" as a cloud upon the title to real estate owned by respondents (Bradley Abst. 22). Petitioner later claimed a lien against the property and made no other claim thereto. As will appear hereinafter, the disposition of lien claims is beyond the scope of the Burnt Record Act, but respondents did not interpret the "caveat" as being limited to a claim for lien. After hearings before a master in chancery of the Circuit Court, in accordance with Illinois procedure, separate decrees were entered granting the relief prayed.

Petitioner Ellithorpe took an appeal to the Supreme Court of Illinois and that Court made no decision on the merits but transferred the case to the Appellate Court of Illinois for the First District because under the Constitution and statutes of the State of Illinois it had no jurisdiction of the appeal.

The Appellate Court considered the case and filed an opinion which was designated "Not to be published in full." Petitioner then sought leave to appeal in the Supreme Court of Illinois, and this was denied. The present petition for certiorari followed.

As to Publication of Opinion.

The opinion of the Appellate Court delivered in connection with the judgment which is sought to be reviewed was published in abstract form only, in accordance with the statute (Illinois Revised Statutes 1955, Chap. 37, § 66).

The opinion is found in 7 Ill. App. 2d 440 and 129 N. E. 2d 578. The opinion in the former citation contains one headnote only, while that in the latter contains four.

As to Jurisdiction of This Court.

The petitioner states that the jurisdiction of this Court is invoked because the "Illinois courts have decided federal questions of substance not heretofore determined by this Court, and also have decided other federal questions in a way probably not in accord with applicable decisions of this Court."

It is the position of respondents that no federal questions whatever were involved in the disposition of these cases by any of the courts that decided and reviewed them.

Constitutional Provisions.

Petitioner appears to rely upon Amendment 14, Section 1, and Amendment 9 to the Constitution of the United States of America (see Appendix D of the petition).

Petitioner also cites various provisions of the Constitution of Illinois. It is not clear whether or not this Court is being requested to review these cases because of alleged violations of the Constitution of Illinois.

II.

STATEMENT OF THE CASE.

The statement in the petition (page 8) that the cases were consolidated in the trial court is erroneous, as will appear from the order referred to (Abst. 33). This order specifically states that the cases were consolidated "for appeal only." The interesting question as to whether or not a trial court had the authority to consolidate the cases for appeal only is immaterial to any issue in this case. In

fact the cases were not consolidated, and a separate decree was entered in each case. Furthermore separate abstracts of record were filed in the Supreme Court of Illinois, although by order of that Court the cases were consolidated for a hearing, and a single brief was filed by each side.

It does not appear from the notice served by counsel for petitioner whether or not both abstracts are filed in this Court with the petition and it may be that only the abstract in the *Bradley* case was filed. The cover of the abstract served upon respondents appears to include both cases, but in fact only the record in the *Bradley* case is abstracted. The general relief prayed was similar in each case, but the real estate and parties were not the same. The petitioner in this Court was a party defendant in both cases.

In referring to the abstract pages, respondents will refer to the pages in the abstract of the record in the *Bradley* case, which is the more complete abstract and which appears to have been filed with the petition for certiorari.

The Burnt Record Act of Illinois.

Shortly after the Chicago Fire a statute was enacted, which is still in force, Illinois Revised Statutes 1955, Chap. 116, §§ 5-28. This statute provides in substance (§ 15) that a person claiming title to real estate, the records concerning which have been destroyed, may file a petition to have his title established and confirmed. The petition must describe the property, state the title claimed by petitioner and include a showing as to the source of that title. In practice, this showing is made by including in the petition an abstract of title beginning with title in the United States. The petition must also allege the destruction of the records and should make all persons interested in or claiming an interest in the title party defendants.

The relief granted upon proof of the allegations in the petition is (1) that the chain of title stated in the petition, if proved, becomes a matter of record in place of the destroyed records, and (2) that the claims of persons other than the petitioner with respect to the real estate are disposed of.

Parties defendant are served personally or by publication, as the case may be, and are required to appear and assert their claims, if any. The statute was before this Court in the case of *Gormley* v. *Clark*, 134 U. S. 338 (1889).

The statute specifically provides (Illinois Revised Statutes 1955, Chap. 116, §19) that the disposition of liens or claims for liens is beyond the scope of the statute and such liens or claims are not affected by any decree that is entered.

As to Claims of Petitioner and the Disposition Thereof.

Petitioner was served with summons in each case and in each case appeared and filed a pleading designated "Answer and Cross-Petition for an Accounting and Lien." This pleading was stricken on motion of petitioners because of the provision in the statute that liens and claims for liens cannot be disposed of in a Burnt Record proceeding and because an accounting is not germane to the petition. It should be noted that the final decree in each case (Bradley Abst. 133) contains the following language:

> Neither this proceeding nor this decree should in anywise affect any lien or liens or claim or claims for lien or an accounting in a separate and distinct proceeding to which the fee of the real estate hereinabove described may be subject, etc.

In November 1947, petitioner filed a suit in the Superior Court of Cook County for partition and an accounting (Bradley Abst. 212) and the respondents and other de-

fendants not parties to the Burnt Record proceedings filed answers. The abstract shows only the answers of certain defendants who were not parties to these present suits (Bradley Abst. 206). This Superior Court suit involves the same real estate as the instant case and is still pending and undisposed of.

After this first pleading of petitioner was stricken in each of the two Burnt Record cases she filed a succession of pleadings which she designated as "Pleas" (Bradley Abst. 37, 42, 45), which were stricken for the reason that they stated no defense to the petition.

Respondents here then made a motion that defendant be required to answer the petitions or, in the alternative, that she file motions which presented no questions which had already been determined, and this motion was allowed by the court (Bradley Abst. 47).

In spite of this order of court, petitioner made another motion to vacate and reverse the orders of court which had overruled her several "Pleas" (Bradley Abst. 48). Respondents then made a motion to default petitioner for failure to comply with the order of court that she file an answer or proper motion. That motion was allowed in part by an order (Bradley Abst. 51) which denied the motion of petitioner to vacate former orders, denied respondents' motion for default and extended the period of a rule to answer that had been entered against appellant.

Nevertheless appellant did not answer; instead she filed (Bradley Abst. 53) a pleading entitled "Suggestions as to the Dissolution of Lake Dearborn Corporation." Petitioners then made a motion that appellant be defaulted for failure to comply with the rule to answer or, in the alternative, that her last pleading stand as her answer, and pursuant to this motion an order was entered (Bradley Abst. 54) that the pleading entitled "Suggestions as to

the Dissolution of Lake Dearborn Corporation" stand as the answer of petitioner.

Respondents replied to this latter pleading, considered as an answer, petitioner filed another motion to dismiss (Bradley Abst. 60), which was denied, and the cases were referred to a master in chancery.

No pleading designated as an answer or denying any fact stated in the petition was ever filed in either case, but in the *Bradley* case, while the cause was before the master, the petition was amended on motion of respondents to correct a misstatement concerning an outstanding dower interest (Bradley Abst. 62-75). Thereafter petitioner filed a pleading which she designated "Notice for Bill of Particulars," which was actually an argument (Bradley Abst. 78), and respondents filed a statement in response to this notice (Bradley Abst. 75).

Petitioner then filed in the *Bradley* case an answer to the amended complaint (Bradley Abst. 80), although the amendment in no way concerned her. This answer did not deny any of the averments of the complaint but restated the substance of the "Pleas" petitioner had theretofore filed and restated petitioner's contention that service of process on other defendants than herself was insufficient. Respondents replied to the answer of petitioner. Thereafter petitioner filed interrogatories (Bradley Abst. 94), which respondents deemed utterly immaterial but which respondents answered (Bradley Abst. 90).

Petitioner then filed in both cases a motion to quash the process and to dismiss the suits (Abst. 96), which was referred to the master along with other issues in the cases (Abst. 95).

The master heard evidence and filed a report recommending the relief prayed in the petitions. Objections and exceptions were filed, argued and overruled, and decrees

were entered. Thereafter appeals were taken as hereinabove stated.

III.

THERE IS NO FEDERAL QUESTION INVOLVED.

The petition for certiorari is substantially a reargument of contentions made before the Illinois courts. The only federal questions suggested are that petitioner has been deprived of her property without due process of law and that she has been denied equal protection of the laws.

Petitioner was accorded all of her procedural rights. She was personally served with summons, she appeared and filed many pleadings and she took part in hearings and offered evidence.

The only claim petitioner ever made with respect to the real estate described in the pleadings is that she had a lien against it. Respondents deny that she had any lien, but if she had one it is not affected by the decrees, which expressly preserved to her the right to establish a lien in some other proceeding if she can (Bradley Abst. 133). Thus the decrees do not deprive petitioner of any substantive rights she has ever claimed.

IV.

REFUTATION OF PETITIONER'S STATEMENT AND ARGUMENT.

Pages 8-29 of the petition purport to be a statement of the case but are in fact a series of arguments, some of which have no basis in the record and some of which are contradicted by the record. Pages 30-51 of the petition purport to be an argument. Neither the statement nor the argument meet the issue as to whether or not there is any question involved that could cause this Court to grant certiorari.

The organization of petitioner's statement and argument is such that it is not feasible, or even possible, to answer her contentions in the order in which they are presented. Respondents will state and discuss what appear to be the principal contentions of petitioner.

1. As to the service of process.

Petitioner admits that she was personally served but contends that service upon other defendants was defective. Certain defendants were served by publication. Respondents are confident that the service by publication was valid, but even if it were not it is no concern of petitioner, who was personally served with summons. The Burnt Record Act provides (Illinois Revised Statutes 1955, Chap. 116, § 20) that a decree in such a case shall be void as to any person not made a party but "shall be final and conclusive as to all others." The statute states the general rule in chancery practice. The affidavits for publication were proper and sufficient, but even if defective do not affect the validity of the service upon petitioner. There is no federal question presented in connection with the service in this case.

2. As to the dissolution of the Lake Dearborn Corporation.

This corporation was a party defendant. It was a Delaware corporation, and prior to the filing of the suits had lost its right to do business in Illinois but was still in existence in Delaware (Bradley Abst. 189). These suits were filed in January 1947 and the charter became inoperative in April 1947. The corporation was served by publication, and thereafter it was dissolved by operation of law in Delaware, but under Delaware law its existence continued so far as pending suits were concerned. This corporation and its shareholders were properly made parties

and served, but even if there were some defect in the procedure this would not affect petitioner or prevent her from being bound by the decree. And certainly no federal question affecting petitioner is presented.

3. As to defendants, their names and the presence of necessary parties.

Petitioner was made a party because she had filed (Bradley Abst. 22) an instrument apparently claiming an interest in respondents' title. The only necessary party as to the issue of the validity of her claim was petitioner. Respondents are confident that the defendants were properly named and all necessary parties were present, but this does not concern petitioner. There is nothing in the record except counsel's statement (Bradley Abst. 153) to support the assertion that eight hundred people should be named as parties. Any defect as to other parties could not deprive petitioner of any rights under the Constitution of the United States.

4. As to consolidation in the trial court.

Petitioner contends that the cases were consolidated in the trial court. The record (Bradley Abst. 34) shows otherwise. It is not clear just why petitioner contends that this matter of consolidation affects her constitutional rights. Petitioner states that consolidation was ordered by Judge Prystalski, the trial judge, but that after his death the order was ignored. This statement is not borne out by the record. Orders entered by Judge Prystalski in his lifetime after the purported consolidation appear in the Bradley abstract at pages 41, 42, 44, 46, 51 and 52 and similar orders, all entered by Judge Prystalski, are referred to in the Young abstract at pages 3 and 4. We do not know whether or not petitioner has filed the Young abstract in

this Court. No federal question can possibly be presented by this contention.

5. As to the decree in reorganization proceedings in 1936.

One of the defendants, the Lake Dearborn Corporation, was successor to a reorganized corporation, the Dearborn-Lake Corporation, which latter corporation went through a 77B proceeding in 1936. The decree in this matter does not appear in evidence except by way of recital in the complaint which petitioner filed in the Superior Court of Cook County, Illinois and which is now pending (Bradley Abst. 216). It is clear, however, that the reorganization was "closed and terminated" (Bradley Abst. 217). The decree also enjoined all persons from suing upon leasehold bonds, past due (in 1936) ground rents or other claims included in the reorganization proceedings (Bradley Abst. 216). Respondents are not suing on account of any of those matters. So far as petitioner is concerned she is a party because she claims an interest in respondents' property, as disclosed by the "caveat" (Bradley Abst. 22) which she recorded as a claim against respondents' property.

The case of *Stoll* v. *Gottlieb*, 305 U. S. 165, has nothing whatever to do with the present case. In that case there was a reorganization proceeding under Section 77B of the Bankruptcy Act. Thereafter there was a suit in the Municipal Court of Chicago, which was reversed by the Appellate Court of Illinois, which was reversed by the Supreme Court of Illinois, which in turn was reversed by the Supreme Court of the United States. The basis of the decision was that the bankruptcy court had jurisdiction of the parties and subject matter of the subsequent suit. In the present case, the court in 1936, ten years before the suits were filed, entered an order that the reorganization

proceedings were "closed and terminated" (Bradley Abst. 217). Petitioner's claim to respondents' property is in no way connected with the reorganization proceeding.

6. As to limitations and laches.

The Illinois statute on limitations has a section (Illinois Revised Statutes 1955, Chap. 83, § 10a) designed to improve the marketability of titles, sometimes known as the Seventy-five Year Limitation Act of 1941. Its principal purpose is to make it possible for title examiners to ignore old unreleased mortgages and interloping conveyances that are of record and appear in abstracts of title. Petitioner contends that since the Chicago Fire occurred more than seventy-five years ago the statute is a bar to the Burnt Record suits. A reading of the statute will show that this is erroneous, and in any case the construction of the Illinois statute of limitations by an Illinois court violates no right of petitioner under the Constitution of the United States.

Respondents do not understand the contention of petitioner that the doctrine of laches has something to do with any of petitioner's rights. Petitioner filed her "caveat" dated November 1945 (Bradley Abst. 22) as a cloud on respondents' title. Slightly more than a year later respondents filed these suits. Laches is an equitable doctrine and petitioner shows no basis for its application. Respondents are unable to see how the cases cited—*O'Brien* v. *Wheelock*, 184 U. S. 450, and *Whitney* v. *Fox*, 166 U. S. 637—have any relevance to the present situation. These cases are apparently cited for the proposition that sometimes a plaintiff may be barred by laches from prosecuting a suit even though the statute of limitations has not run at law. These cases have no relevance in the present case.

7. As to the charges against Messrs. Farr and Chinnock.

Mr. Newton C. Farr and Mr. Ronald J. Chinnock operate a real estate firm in Chicago and one of their functions is building management. They have for some years managed for respondents the real estate described in the petition but have no interest whatever in the property. They are not parties to either of the Burnt Record suits, but petitioner made them parties to her suit now pending in the Superior Court of Cook County referred to hereinabove.

There is absolutely no justification in the evidence for the reckless charges petitioner makes against them. And in any case, how is their integrity material to petitioner's constitutional rights under the present record? If she is entitled to an accounting from them, the decrees appealed from expressly preserve her rights (Bradley Abst. 133).

8. As to default after amendment.

No amendment was ever filed in the *Young* case. During the hearings before the master an amendment was filed in the *Bradley* case to correct a slight error as to an outstanding dower interest. Certain defendants had been theretofore defaulted. A rule to answer was entered and they were again defaulted as to the complaint as amended.

It is submitted that this was proper chancery practice, particularly since no defaulted defendant could have been damaged by the amendment. Although petitioner was in no way concerned by the amendment, she answered the complaint as amended (Bradley Abst. 80). Even if other defendants were wrongfully defaulted—which respondents deny—no right of petitioner was affected, and no federal question is presented.

9. As to proceedings in Illinois courts of review.

Petitioner appealed to the Supreme Court of Illinois. That Court, finding that it had no jurisdiction of the appeal, transferred the case to the Appellate Court for the First District of Illinois. The Supreme Court wrote no opinion and the clerk refused petitioner permission to file a petition for rehearing. The Appellate Court considered and decided the appeal, and wrote an opinion, which was published only in abstract form. Petitioner then prayed leave to appeal to the Supreme Court of Illinois and this was denied.

Petitioner contends that her rights under the Constitution of the United States were violated because the Supreme Court of Illinois wrote no opinion when it transferred the case and because the clerk of that Court refused to accept a petition for rehearing. The case was transferred under the provisions of the statute (Illinois Revised Statutes 1955, Chap. 110, § 86). Due process does not require a written opinion or a rehearing in any case and certainly not in the situation presented by the present record where there was no decision on the merits.

10. As to judicial notice.

Respondents made a motion that judicial notice be taken of the Chicago Fire in 1871 and the fact that the records in the Cook County Courthouse were destroyed (Bradley Abst. 145). Counsel for petitioner objected mildly on the grounds that the suit was barred by the Seventy-five Year Statute of Limitations but agreed that the fire was an historical event (Bradley Abst. 146). The objections to the master's report (Abst. 104, No. 18) state only the objection that the limitations statute makes judicial notice improper.

It is submitted that the rule of a state as to judicial notice does not present a federal constitutional question.

COPY BOUND CLOSE

11. As to the contention that a forfeiture is involved in these cases.

Respondents do not see how the reluctance of a court of equity to enforce a forfeiture has anything to do with this case. Petitioner claimed a lien and, while respondents contend that the claim is without validity, the decrees appealed from preserve whatever lien claim she may have.

Petitioner refers to a 99-year lease. She refused to file any pleading making any claim under any such lease, although invited to do so many times (see, for example, Bradley Abst. 177, 178, 179). It is clear that petitioner recorded an instrument as a cloud on respondents' title; that she was personally served and given an opportunity to support the claims set out in the recorded instrument. When her claim for lien was stricken she made no other claim but filed the suit now pending in the Superior Court of Cook County. No federal question can arise from this situation.

12. As to public importance of this litigation.

As to this section of the petition, respondents will say nothing more than that the statements made are not supported by the record.

Contentions 1-12 discussed hereinabove appear to be the principal bases for petitioner's position. There are other statements made, some of which are improper. For example, on page 24 the statement is made that no Burnt Record proceeding appears on the docket of the Circuit Court of Cook County for twenty years prior to January 21, 1947, the date the present suits were filed. There is nothing in the record that shows this statement to be the truth and respondents deny it. In 1932, the Supreme Court of Illinois, in the case of *Pullman Car and Mfg. Co.*

E IN CENTER

v. *Stroh*, 349 Ill. 492, the court construed the Burnt Record Act in the following language:

> * * * The destruction of records in a chain of title gives a court of chancery jurisdiction, on petition, to inquire into and establish title, and having so acquired jurisdiction it may remove a cloud from the title in the same suit. *Gage* v. *Harbert*, 145 Ill. 530; *South Chicago Brewing Co.* v. *Taylor*, 205 id. 132.

This was less than fifteen years prior to the filing of the present suits.

As to Petitioner's Appendix A.

Respondents will not lengthen this argument by commenting upon each entry in the time-table shown at Appendix A. Many of the statements there made do not appear of record except as allegations in petitioner's suit which is still pending.

CONCLUSION.

Respondents have not discussed most of the authorities cited by petitioner. Not one of them has any bearing upon the issue as to whether any federal question is involved. Likewise, respondents have not referred to what they consider the unsupported and irresponsible charges of "Sham, Fraud, and Evasion." Respondents invite the attention of the Court to the record and submit that it shows no basis for such charges.

The only issue before this Court is whether or not petitioner's rights under the Constitution of the United States were violated. She was duly served with process, she appeared and took an active part by her counsel in lengthy proceedings, and the final decrees specifically do not dispose of the only claim she ever asserted—that is, that she had a lien against the property.

COPY BOUND CLOSE

It is the position of respondents that the petition for certiorari should be denied.

Respectfully submitted,

J. F. Dammann,
W. S. Bodman,
120 W. Adams Street,
Chicago 3, Illinois,
Attorneys for Respondents.

Wilson & McIlvaine,
120 West Adams Street,
Chicago 3, Illinois,
Of Counsel.

IN CENTER

JUL 1 3 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1956.

No. 148

EVELYN PRATT ELLITHORPE,
Petitioner,

vs.

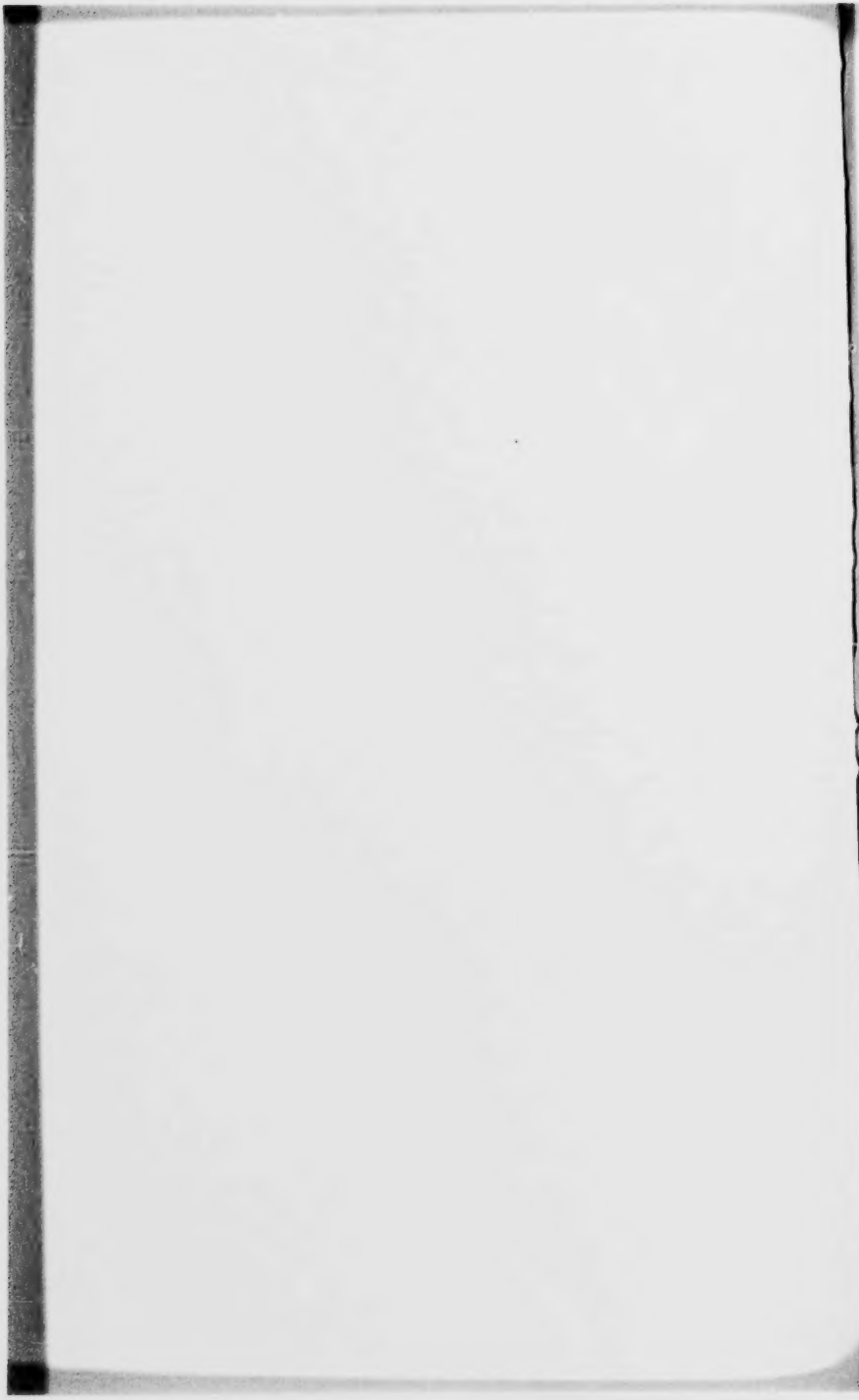
KATHERINE W. BRADLEY, and
BENNET BOTSFORD YOUNG and others,
Respondents.

REPLY BY ELLITHORPE PETITIONER TO ANSWER BRIEFS FOR RESPONDENTS.

WEIGHTSTILL WOODS
53 West Jackson Blvd.
Chicago 4, Illinois
Attorney for Petitioner

CHICAGO LAW PRINTING CORPORATION, 189 W. MADISON, CHICAGO – FRANKLIN 2-6521

SE IN CENTER



COPY BOUND CLOSE

INDEX.

PAGE

Cases Mentioned by Respondents 1

Federal Court Decree 3, 4, 10, 11, 18

Caveat and Liens ..... 3, 4, 7, 15, 19, 22, 25-27, 30 and 31

Reckless Statements by Respondents 5

Order for Consolidation 6, 21

Hiatus Between State and Federal Courts 9

Civil Practice Statutes of Illinois 9, 12, 13

Delaware State Statutes 11

Burnt Record Statutes 11

Lake Dearborn Corporation was defunct 12

Stockholders own the Leasehold 12

Corporation Statutes of Illinois 12, 13

Tax Deed Diversion by Respondents 13

Leasehold Issues not in Burnt Record litigation 15

Partition Statutes of Illinois 17

Ellithorpe Pleadings are sufficient to compel Burnt Record Dismissal 18

Judicial Notice has no Foundation 20

No Basis for Evidence for Respondents 20

Shifting Contentions for Respondents 22

Respondents are purchasers subject to Leasehold 22

IN CENTER

PAGE

Burnt Record Petitions 25

Dismissal Order for Ellithorpe Answer etc. 26

Sham, Fraud and Evasion by Respondents 27

Respondents Custody of Leasehold is Fiduciary 28

Factual Defenses for Ellithorpe are Admitted 29

False Argument by Respondents about Lien 30

Summary and Conclusion for Ellithorpe 33

Federal Questions Established 35

American Idea by John Adams 36

CASE INDEX FOR ELLITHORPE PETITION.

Agram v. Checker Taxi Company, 412 Ill. 145 40

Altendorf v. EJE Ry. Co., 8 Ill. 2d 164 42

Barnett v. Cook County, 388 Ill. 251 32

Brown v. Western Ry. Co. of Alabama, 338 U.S. 294 44

Burdeau v. McDowell, 256 U.S. at 477 45

Burrows v. Palmer, 5 Ill. 2d 434 31

C. B. & Q. Ry. Co. v. Chicago, 166 U.S. 226 46

Central of Ga. Ry. Co. v. Wright, 207 U.S. 127 32

Cities Service Oil Co. v. Dunlap, 308 U.S. 208 46

City of Chicago v. McCausland, 374 Ill. 34 ..... 46, 47

Conway v. Cable, 37 Ill. 82 42

Coombes v. Getz, 285 U.S. 434 42

Craig v. Harvey, 331 U.S. 367 46

COPY BOUND CLOSE

PAGE

Craig v. Sullivan Machinery Company, 344 Ill. 334 33

Dillon v. Gloss, 256 Ill. 368 31

Dombrow v. Dombrow, 401 Ill. 324 7

Fitzu v. Levin, 399 Ill. App. 391 40

Flynn v. La Salle National Bank Docket, 33646 Ill. 29

Gage v. Du Puy, 127 Ill. 216 35

Giese v. Terry, 382 Ill. 34 31

Gilbert v. C. T. & T. Co. 7 Ill. 2d 496 45

Grahaı v. O'Connor, 351 Ill. at 40 33

Griffin v. Illinois, 351 U.S. 12 43

Hall v. Cook County, 353 Ill. 477 48

Harms v. Wuerth, 396 Ill. 73 32

Hauser v. Power, 351 Ill. 36 31

Hill v. Hinman etc., 365 Ill. 129 34

Illinois Valley Bank v. Newman, 351 Ill. 380 31

Judicial Notice, 15 RCL 1026 37

Kingsley v. Roeder, 2 Ill. 2d 131 40

Livingston v. Myers, 6 Ill. 2d 325 35

Loewenthal v. Elkins, 175 Ill. 553 34

McNabb v. United States, 318 U.S. 332 45

Miller v. Siwicki, 8 Ill. 2d 362 35

Mott v. Danville Seminary, 129 Ill. 403 30

Mullone v. Hanover Bank and Trust Company, 339 U.S. 316 33

Nashville etc. Ry. Co. v. Walters, 294 U.S. 414 44

O'Brien v. Wheelock, 184 U.S. 450 ..... 17, 35

E IN CENTER

PAGE

Parker v. People of Illinois, 333 U.S. 571 49

People v. Bicek, 405 Ill. 510 32

People v. Bridge Company, 287 Ill. 246 36

People v. Dugan, 401 Ill. 442 48

Potter v. Couch, 141 U.S. 296 45

Powell v. Powell, 335 Ill. 533 ..... 34, 38

Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62 48

Schuyler County v. Mo. Bridge Co., 256 Ill. 348 40

Shields v. Barrow, 21 U.S. 409 31

Stoll v. Gottlieb, 305 U.S. 165 ..... 4, 16

Trustees of Schools v. Batdorf, 6 Ill. 2d 486 35

University of Chicago Law Review at page 116 49

Urie v. Thompson, 337 U.S. 163 46

Warner v. Gosnell, 8 Ill. 2d 24 17

Whitehall v. Alexander, 229 F. 2d 47 21

Whitney v. Fox, 166 U.S. 637 17

Woods Trustee v. City National Bank, 312 U.S. 262 29

COPY BOUND CLOSE

PAGE

CASES DISCUSSED BY ELLITHORPE REPLY.

Ambrosius v. Katz, 2 Ill. 2d 173 ..... R 29

American Idea by John Adams ..... R 36

Dillon v. Gloss, 256 U.S. 368 ..... R 11

Gage v. Du Puy, 127 Ill. 216 ..... R 19

Gormley v. Clark, 134 U.S. 338 ..... R 1

Harding v. Fuller, 141 Ill. 308 ..... R 20

Harms v. Coryell, 177 Ill. 496 ..... R 18

Hill v. Hinman Corporation, 365 Ill. 129 ..... R 16

Kalb v. Feuerstein, 308 U.S. 433 ..... R 4

Larson v. Johnson, 1 Ill. App. 2d 36 ..... R 33

Loeber v. Schroeder, 149 U.S. 580 ..... R 4

Miller v. Hatfield, 309 U.S. 1 ..... R 6

Northern Pacific v. Patterson, 154 U.S. 130 ..... R 4

O'Brien v. Wheelock, 184 U.S. 450 ..... R 4

People v. Jennings Tavern, 3 Ill. 2d 125 ..... R 12

Powell v. Powell, 335 Ill. 533 ..... R 16, 17

Pullman Car v. Stroh, 349 Ill. 492 ..... R 5, 14

Schuyler County v. Missouri Bridge Company ..... R 37

Shapleigh v. Mier, 299 U.S. 468 ..... R 20

Sherwin-Williams v. Watson, 361 Ill. 599 ..... R 28

Stoll v. Gottlieb, 305 U.S. 165 ..... R 3

Tanner v. Tanner, 326 Ill. 302 ..... R 29

Thompson v. McGrue, 3 Ill. 2d 168 ..... R 21

Weber v. Mick, 131 Ill. 520 ..... R 28

Whitney v. Fox, 166 U.S. 667 ..... R 4

Williams v. Kaiser, 323 U.S. 471 ..... R 5

IN CENTER

COPY BOUND CLOSE

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1956.

No. 148

EVELYN PRATT ELLITHORPE,

Petitioner,

vs.

KATHERINE W. BRADLEY, and
BENNET BOTSFORD YOUNG and others,

Respondents.

REPLY BY ELLITHORPE PETITIONER TO ANSWER BRIEFS FOR RESPONDENTS.

Except as herein expressly admitted Petitioner Ellithorpe denies and protests the whole of Answer Briefs for Respondents, and denies all statements therein made.

Cases Mentioned by Respondents.

Respondents refer at page 5 to *Gormley* v. *Clark*, 134 U.S. 338. That case arose in old Circuit Court of the

N CENTER

United States for the Northern District of Illinois at Chicago. It was decided on appeal in year 1889, less than twenty years after Chicago fire.

Judicial Notice is not mentioned by any one anywhere in the *Gormley* case. On the contrary witness Bradley failed to prove any destruction of records by fire (Gormley abstract 121-122). And witness Martin was called for testimony about the fire (Gormley abst. 127). Testimony and documents were used to prove that case.

That *Gormley* case was framed extensively for removal of clouds on title. (Leaseholds are not clouds on titles). Years after the Chicago fire, Gormley recorded documents against the title to a subdivision. And in 1877 he and wife mortgaged the property. The bill and evidence rely basically upon completed foreclosure proceedings in the state courts, that were affirmed on appeal. An injunction was asked and entered at the outset, and later a writ of assistance to oust Gormley and others, and place Clark in possession, 134 U.S. 341. In Gormley abstract, the reference to Burnt Record was short and incidental. The bill and record appear to be complete without Burnt Record action. 134 U.S. 349. There was extensive oral testimony and documents (Gormley abstract 99-121 and 240 *ff*, and decree 38-42). The acts of Gormley to cloud the title are fully stated in detail by complaint (Gormley abstract 4-8). All defendants are named in headings to bill, to summons, to publication, to notices, and especially in parties paragraph, and all notices served. There was special prayer for injunction and other relief (Gormley abstract 7-9 and 16-19). There was special court order for personal service upon non-residents, and proof of such service made and filed. That service was made by United States Marshal in State of Vermont (Gormley abstract 32-35). There

was direct testimony about residence of the defendants. The newspaper notice publication to parties not resident and not summoned, was four successive weeks, and copies were mailed by clerk of court to non-residents. Proofs of that service were filed in the cause (Gormley abstract 32-35).

All these bases, which are necessary for constitutional jurisdiction, that were used in the *Gormley* case, *are absent from the record at bar.* That absence is shown by Ellithorpe Petition, and abstract in this Court (Abst. 37-107). Although the *Gormley* case which is cited by Respondents as classic example, has been available to Respondents for many years to show them what to do, in proper conduct of this kind of litigation, the incomplete and barren record herein made by Respondents, is an example of what not to do (Petition 10-20).

Ignoring the Gormley authority and example, Respondents failed by their pleading, by their notices and their decrees, to establish constitutional service of process, and failed to make any reference about any interest of Mrs. Ellithorpe, to connect her in any way whatever with the subject matter of the proceeding. No reference was made to her *caveat,* by Respondents in their record at any time (Abst. 80). Respondents ignored the decree for reorganization in United States District Court, No. 56924, dated 1936. Upon that decree as a muniment of title, Mrs. Ellithorpe had relied when making her investment (Abst. 218-12). Illinois Courts refused to enforce that federal court decree.

At page 11 Respondents say that *Stoll* v. *Gottlieb,* 305 U.S. 165 is not relevant, to show enforcement of reorganization decree. If such decree herein (Abst. 23, 38, 41, 215, 216) modifying leases of land, be not a muniment of

title, what kind of decree ever could be? Bankruptcy action is primary law of the land, so made by the Constitution of the United States. *Kalb* v. *Feuerstein,* 308 U.S. 433 443). The *caveat* (Abst. 22*ff*) expressly stands upon that decree made in case 56924, a reorganization proceeding in United States District Court at Chicago. That *caveat* is exhibit A to said cross-petition by Ellithorpe (Abst. 15*ff*). Dismissal of answer and cross-petition (Abst. 34) on motion by Respondents, carried *caveat* into new suit (Abst. 206ff) in Superior Court. Ellithorpe reasserts the pointed relevance and authoritative character of the *Stoll* v. *Gottlieb* decision, 305 U.S. 165, as precedent to dismiss Burnt Record suits. (Pages 4 and 16 of Petition)

At page 12 Respondents say *O'Brien* v. *Wheelock,* 184 U.S. 450 and *Whitney* v. *Fox,* 166 U.S. 667, are not relevant to status of this record. Respondents fail to meet or discuss the factual matter and relevancy presented by pleas by Ellithorpe (Abst. 42-46). Ellithorpe reasserts those cases are in point directly for Burnt Record dismissal and to sustain her pleas on the record.

The Brief for Guardian *ad Litem* at page 5 mentions *Loeber* v. *Schroeder,* 149 U.S. 580 at 585. Your Honors there stated that you had no jurisdiction because quashing a writ in the trial court was not a final order. That has no relevancy to our case. The answer Brief for Respondents herein at page 11 confirms finality of the decree.

The Brief for Guardian *ad Litem* at page 6 mentions *Northern Pacific Railroad* v. *Patterson,* 154 U.S. 130 at page 134. In that case the litigant having notice from county board for tax equalization, had failed to pursue administrative remedy, before coming to court. Respondents do not mention any relevancy to this present record. On the contrary they contend we have been too diligent about our efforts to defend against Burnt Record litigation, after

COPY BOUND CLOSE

summons from Respondents. Ellithorpe clearly has used all possible procedures. The citation has no relation to this present record.

The Brief for Guardian *ad Litem* at page 7 mentions *Williams* v. *Kaiser*, 323 U.S. 471; and quotes from the *dissenting opinion* at page 481. The majority opinion rules to the contrary, and support position of Ellithorpe on this record.

Neither Respondents nor Guardian *ad Litem* face up to the issues presented by Ellithorpe Petition. They make bald negative statements unsupported by any detail of fact or argument. They abstain from analysis. They avoid frank discussion of most important issues.

Reckless Statements by Respondents.

At page 15 Respondents say further:

> "There are other statements made, some of which are improper. For example, on page 24 (Ellithorpe Petition) the statement is made that no burnt record proceeding appears on the docket of the *circuit court of Cook County* for twenty years prior to January 21, 1947, the date the present suits were filed. There is nothing in the record that shows this statement to be the truth and *Respondents deny it.* In 1932, the *Supreme Court of Illinois* in the case of *Pullman Car and Mfg. Co.* v. *Stroh*, 349 Ill. 492, construed the Burnt Record Act * * * That was fifteen years prior to filing of the present suit."

Eminent Counsel for Respondents thereby overlooked the first sentence of their citation. That sentence in *Stroh* case reads as follows (349 Ill. 493):

> "This (*Stroh*) case in the *circuit court of Cook County* was a *Petition filed June* 22, 1926, *under the Burnt Record Act,*" etc.

IN CENTER

Thereby the *Stroh* case was filed more than twenty years before the present litigation was begun January 21, 1947. Thereby said contention by Respondents is refuted by their own citation.

Petitioner renews her assertion that obsolete and unlawful procedures were used by Respondents. Instead of freedom for pursuit of happiness, your Petitioner has been the target of harassing litigation for ten years.

Respondents at page 10 ignore the positive language of order for consolidation, as follows (Abst. top 34):

> "It is ordered that Burnt Record cases 1766 and 1767 in this (circuit court) court, and also the counterclaim and cross-petition by Evelyn Pratt Ellithorpe for an accounting and lien in chancery, now on file in each of these Burnt Record cases, be and hereby *are consolidated* for purpose of appeal only, *and shall proceed as a single suit to be designated hereafter by all pleadings, notices and orders as Burnt Record* 1767."

That Record No. 1767 has been brought forward through Illinois courts to this Court, by the larger printed abstract —called Bradley by Respondents. Pursuant to that order of consolidation and later orders by Supreme Court of Illinois (Petition page 10), all references properly are made to that abstract, as abstract for consolidated case. The consolidation made both cases one, (below page 21).

Respondents say further at page 10:

> "The only necessary party as to the issue of the validity of her claim was Petitioner".

That statement ignores the controlling and applicable decisions by Illinois Courts discussed at page 31 of Petition. Respondents also ignore *Miller* v. *Hatfield,* 309 U.S. 1 and other decisions by Your Honors. All these cases decide that all proper parties must be before the Court,

COPY BOUND CLOSE

before hearing may be had and decree entered. In the trial Court and Illinois Courts of review, and here by her Petition, Ellithorpe at all times has objected that all hearings were premature and without foundation for want of parties necessary on the record. The *caveat* and pleadings in Superior Court, show clearly who were necessary parties, in Burnt Record proceeding, before the Order June 17, 1947 dismissed without prejudice the answer, *caveat* and cross-claim by Ellithorpe. (Abst. 34)

At page 10 Respondents say:

> "There is nothing in the record except counsel's statement (Abst. 153) to support the assertion that eight hundred people should be named as parties".

That colloquy at Abst. 152ff reads as follows:

> "Mr. Woods: I am contending that these people were not served by publication or in any other manner; and I have a right to show that they were not served by publication, and that is what I am trying to do.
>
> "Mr. Bodman: I say they were served by publication; but assume that they were not, how does that affect your client?
>
> "Mr. Woods: It affects my client in the way that it throws the whole burden of the defense on one person, when there are 800 involved. There is nothing more vicious than that.
>
> "Mr. Bodman: Well, none of the 800 people are here. (No denial made on record)
>
> "Mr. Woods: How could they be here when you never told them there was a lawsuit here?
>
> "Mr. Bodman: I suppose that the orderly procedure is for me to object or not to object, and I shall ask the reporter to read the last question. (Last question and answer read)
>
> "The Master: You may proceed. Any further examination of the witness?"

Thereby it appears that Mr. Bodman acquiesced at that time. He did so because the statement by Mr. Woods was based upon the record:—

> "Since April First 1947, all title and interest in all property which said former Corporation ever had, then passed by devolution of law, to become on that date, undivided and exclusive property of its former stockholders, who are about 800 in number, residing widely over the United States of America. They have not been made parties defendant, nor summoned by process." (Abst. 46)

It is obvious that a corporation which had built a commercial structure at a cost exceeding one million dollars in 1928, when reorganized in 1936 (Abst. 23, 38, 41, 215-216 and elsewhere) by the United States District Court at Chicago, would have a large number of stockholders, former bondholders, scattered widely over the United States, many years later when Burnt Record was filed. It was ruthless indifference and sabotage for Respondents to ignore these owners of the leasehold property, in their conduct of this litigation. An honest suit would have stated expressly that the leasehold was not to be affected by the Burnt Record Proceeding. (Pages 10, 12, 15 below.)

Respondents say at page 8 that Petitioner made no other claim. They ignore all the jurisdictional pleadings and all the motions on constitutional grounds, set forth at pages 10-20 of the Petition, (Abst. 37-107). Since Respondents did not answer any of those pleadings, all fact statements made by each of the pleadings stand admitted by record.

Respondents suggest that Mrs. Ellithorpe in Burnt Record suit could have made claim for Lake Dearborn Corporation, since no one else appeared to do so. That is not true. As a stockholder she had no such authority.

COPY BOUND CLOSE

There being no attempt to serve summons, there was absent the indispensable basis for publication notice or service, and legal publication not having been made and copy mailed as compelled by Illinois Civil Practice Act and other statutes, to conform to constitutional requirements (Petition page 33) neither Mrs. Ellithorpe nor any one else, would have authority to appear for Lake Dearborn Corporation. Furthermore the Lake Dearborn Corporation was defunct (Abst. 53), and the stockholders (about 800—Abst. 46) had succeeded to leasehold title that was owned by Lake Dearborn Corporation at a former date. (Petition 17)

At page 13 Respondents say that Farr and Chinnock "Have no interest whatever in the property." At the trial (Abst. 165-166, 185-186) Respondents admitted Farr and Chinnock's ownership of stock in Lake Dearborn Corporation, individual stock and escrow stock. As such stockholders they became owners of undivided interest in escrow to the leasehold by devolution of title upon dissolution of Lake Dearborn Corporation (Petition 17; Abst. 101). They should have been made parties (Abst. 101), and should have performed the escrow trust; (Petition pages 53-54) but instead said Farr and Chinnock were directing attorneys to destroy the interest and property of their escrow beneficiaries. They also testified as though they were independent witnesses (Petition 26).

Hiatus between state and federal courts.

Respondents at page 11 say this:

> "One of the defendants, the Lake Dearborn Corporation, was successor to a reorganized corporation, the Dearborn Lake Corporation, which latter corporation went through a 77B proceeding in 1936. The decree in this matter does not appear in evidence except by way of recital in the complaint which Petitioner

IN CENTER

filed in the Superior Court of Cook County, Illinois, and which is now pending (Abst. 216)."

By such statement Respondents ignore the factual matters stated by plea in Bar (Abst. 37-38), which stand admitted on this record by the motion to strike made by respondents (Abst. 40). That Plea in Bar (Abst. 38), states admitted facts as follows:

"3. From that decree on December 16, 1936, in cause No. 56924, no appeal nor review was ever taken. That final decree remains in full force and effect. All the parties to this present suit and their grantors and privies were parties to that reorganization suit and all are bound thereby.

"4. By those proceedings and decree in said Cause No. 56924, the fee simple titles to the land and real estate which is described by the petition of plaintiffs (present Respondents) in this action, was established in the parties to that proceeding who are petitioners (present Respondents) in present suit or their privies, subject only to the lease-holds in favor of Lake Dearborn Corporation, which have been set forth by the answer and counterclaim in this present record, which was filed by Evelyn Pratt Ellithorpe.

"5. Thereby your defendant (present Petitioner for Certiorari) claims that all questions as to supposed Burnt Record titles, which are mentioned by plaintiffs (present Respondents) in this suit, were fully and finally adjudicated and removed from litigation against all parties to that suit (reorganization) and their successors and privies in title, and likewise against all parties to this (Burnt Record) suit.

"Therefore your defendant (Ellithorpe) pleads said proceeding in Cause No. 56924 and said final decree therein dated December 16, 1936, as complete and final bar to this present suit. Your defendant (Ellithorpe) asks that this (Burnt Record) suit shall be dismissed as oppressive litigation, with all costs against the pe-

COPY BOUND CLOSE

titioner plaintiffs (Respondents), and that your defendant (Ellithorpe) may recover her costs herein most wrongfully sustained".

If federal court decrees about real estate titles may be thus ignored, they are worthless. When Courts of Illinois refuse to enforce them, Your Honors should instruct by decision herein, what are the duties of District Courts. When present Counsel has asked Federal District Courts to enforce reorganization decrees, the answer has been "that such decrees when final, are details of title, to be enforced in State Courts, the same as all other civilian property rights".

REPLY FOR PETITIONER, ELLITHORPE.

This reply will ignore the division of material sought by the brief for Respondents, which rearranges and fragments the points discussed. We discuss under our original headings all their brief has said. All leasehold matters remain pending in Superior Court of Cook County.

I.

Respondents mention the statute (Abst. 58) of Delaware as to suits against Delaware corporations in the State of Delaware. That is a local procedural statute. Respondents did not file any suit in Delaware. That statute cannot be used in the State of Illinois. Illinois statutes govern time for suits in Illinois against persons and corporations. Respondents made no attempt to comply with applicable statutes of Illinois. Only Illinois law applies to real estate in Illinois. The publication notice under section 12 of burnt record act, has no sufficiency by itself. Petitioners have ignored sections of Illinois conveyances Act,

IN CENTER

corporation act, civil practice act, and chancery act, and many sections of burnt record act. Their record has no foundation. This we have shown by the Petition.

Lake Dearborn Corporation was defunct before present litigation was begun. Stockholders are owners of leaseholds.

Sections 157-122 and 123 of Illinois Business Corporation Act, provide for revocation of authority to foreign corporation to do business in Illinois, and for certificate of such revocation, and for recording of same in the county recorders office where business was done. See abstract page 189. Section 157-143 provides that annual franchise tax must be paid before July 31st in each year to prevent default and forfeiture; and section 157-149 provides that any such certificate by Secretary of State is evidence as to status of the foreign corporation. The case of *Dillon* v. *Gloss,* 256 U.S. 368 rules at page 376 that the date of the fact consummated controls, and the date of certification by the Secretary of State relates back to date of consummation of act certified.

Thereby the title to leasehold devolved in fact from Lake Dearborn Corporation, a Delaware Corporation, to vest in the shareholders on August first 1945, tho not certified by Secretary of State until November 15, 1945. The burnt record suits were not filed until January 21, 1947. All stockholders are necessary parties, if the leasehold is part of Burnt Record litigations. See page 15 below.

Recently Illinois Courts discussed the mandatory nature of correct publication pursuant to statute and the constitution, as basis for due process of law and equal protection of law: *People of Illinois Appellee* v. *Lloyd Jennings d/b/a Jennings Tavern,* 3 Ill. 2nd 125; 119 N.E. 2 781. The

COPY BOUND CLOSE

principle of that decision sustains the constitutional objections made at bar by Mrs. Ellithorpe for want of service upon Lake Dearborn Corporation, upon the so-called minors, and the stockholder successors to defunct Lake Dearborn Corporation.

The cases cited and discussed by Petitioner stand admitted. Their authority is not seriously questioned by anything said in the brief for Respondents. Those cases are the basic law of Illinois. Failure by Respondents to comply with that basic law, as stated by our factual demonstration from the record, and refusal by Master and trial court to compel such compliance, clearly establish the argument at page 30ff of Petition namely:

THE DECREES JANUARY 8, 1954 ARE VOID FOR DENIAL OF DUE PROCESS AND DENIAL OF EQUAL PROTECTION OF LAW, FOR FAILURE TO BRING NECESSARY PARTIES BEFORE THE COURT BY ESTABLISHED PROCEDURES, AND FOR DEPARTURES FROM BASIC REQUIREMENTS OF FEDERAL AND STATE CONSTITUTIONS.

II.

Tax Deed diversion by Respondents is not relevant for pleading on this record.

"No tax deed or certificate of tax sale based upon any proceedings, the record of which shall appear to have been destroyed, as aforesaid, shall be received in any of the courts of this state as prima facie evidence of the regularity of such proceedings, *but the burden of proof shall be upon the person claiming under such deed or certificate* to show the regularity and legality of such proceedings, in order to sustain the validity of any tax deed or sale for any tax or taxes, assessment or assessments, in any county to which the provisions of this act are applicable, in any suit or proceeding whatsoever, it shall be necessary for the party relying upon any such deed or sale to show,

IN CENTER

affirmatively, that each and all the provisions of law, in respect to assessment, levy, sale and deed of the lands affected, or to be affected by any such deed or sale as aforesaid, have been in all respects complied with — and no presumptions shall be indulged in favor of any such tax deed or sale; and it shall not be sufficient to show a collectors report, notice, judgment, order of sale, sale notice, notice of sale, tax affidavit and deed, anything in this law or any other law of this state to the contrary notwithstanding."

(Section 18 Burnt Record Record Act since 1874)

There are no tax deeds nor tax deed matters mentioned anywhere in the record at bar. So the provisions of that special statute can not be applicable to any defendant on this record. On the contrary, that statute shows that tax deeds are an exception.

So far as this record shows, the rights of Burnt Record defendants arise under common law and the general civil statutes. As to such persons the general civil practice applies. Under that practice Burnt Record Petitioners must state the matters to be resolved. Defendants need not answer conclusions of law, and do not admit them. It is elementary that only facts well pleaded can be determined. General conclusions of law lay no foundation for any decree.

The case of *Pullman Car & Mfg. Corporation* v. *Stroh* 349 Ill. 492 (cited at page 16 of brief for Respondents) rules as follows:

"The effect of the Burnt Record Act was to enlarge the jurisdiction of courts of equity, and *proceedings to establish title under that act, are chancery proceedings and the rules and regulations governing court of chancery in this state are applicable to them.*" 182 NE at 404. (Also Section 22 Burnt Record Act; and Petition page 42) Civil Practice Act controls.

COPY BOUND CLOSE

Issues as to leaseholds were not made part of the Burnt Record proceedings.

The leaseholds are not mentioned by the petitions nor by decrees. The buildings and improvements are not mentioned by petitions nor decrees. Furthermore the Master ruled that leaseholds were not an issue in these cases (Bradley Abst. pages 26, 178, 179) and the Court confirmed the Master (Abst. 111.).

Furthermore the admission by Respondents that suit was removed to Superior Court, admits that leasehold matters are there for that accounting (answer pages 5-6).

There never were any common counts nor general issues allowed to be used in chancery pleading. Always all pleadings for relief in equity, have been written statements of facts thruout the history of chancery. Always only facts and not conclusions of law, have been necessary to raise issues, and to sustain any decree. Sections 33 and 34 of Civil Practice Act and related provisions, and rules 11 and 15 by Supreme Court, continue that system of factual written pleading in chancery.

The primary duty to plead and prove facts, as their only means to raise issues for consideration by the court, remains as burden at all times, upon Respondents in pursuing their burnt record proceedings.

However instead of pleading about leasehold matters, or taking issue with pleading by Mrs. Ellithorpe about leaseholds in the burnt record proceedings, Respondents made motion to strike and dismiss entirely all pleading by Mrs. Ellithorpe, including her *caveat* exhibit A, claiming that none of the issues tendered in any manner by pleadings by Mrs. Ellithorpe, could be heard or determined in the burnt record proceedings, because they said,

IN CENTER

the court had no jurisdiction to hear or determine any of them. Whereupon the court assented to Respondents and gave them their wish, by striking and dismissing from circuit court, any and all matters presented and suggested by pleadings by Mrs. Ellithorpe, except only the "suggestions as to dissolution of Lake Dearborn Corporation".

Hill et al. v. *Hinman Avenue Building Corporation et al.*, 365 Ill. 129 6 NE 2 128, was relied on by Respondents.

In that case the trial court entered a decree to remove a 99-year lease as a cloud on title of lessors. The Appellate Court and the Supreme Court reversed, and directed dismissal of the complaint. Short quotation from the opinion by the Supreme Court will be sufficient.

> "The complaint alleges, and all parties admit, that the owners of the fee are in possession of the property and no one is disputing their right to possession, which is notice to the world of their title to and rights in the property. As pointed out by the Appellate Court, it is apparent from the complaint that the lease always has been, and still is, a valid instrument evidencing the agreement of the parties, that a lessee is bound to admit his landlord's title, and the general rule is well settled that a valid lease cannot be a cloud upon a title."
>
> "We are of the opinion that the complaint in this case presents no basis for equitable jurisdiction, and that the judgment of the Appellate Court remitting the parties to such action at law as they may have at law is right and must be affirmed. Judgment Affirmed."

Clearly that case confirms our citation of the case of *Powell* v. *Powell* at page 34 of Petition, 335 Ill. 533 at 538, which rules that ejectment at law is the remedy for lessor to use and that motions by Mrs. Ellithorpe to dismiss burnt record petitions should have been sustained. The Supreme Court should reverse those orders and dismiss the proceedings entirely with costs against Respondents.

COPY BOUND CLOSE

Since Respondents have admitted that the *Hill* case prevented them from using a quiet title suit or suit to remove clouds, it follows that they also are remitted to suit at law. Since the *Pullman* case above places burnt record suit within the nature and practice of chancery procedure, it follows that Respondents are equally forbidden to use burnt record suits to remove a leasehold. They did not by any pleading attempt to do so. Any claim in their brief that they have done so, clearly is unfounded and fraudulent. Furthermore Respondents refused to allow Ellithorpe as a defendant, to raise any issue about the leaseholds. They insisted then that circuit court as chancery court had no jurisdiction thereof.

No language of Burnt Record Act purports to authorize any proceeding under Burnt Record Act to affect leaseholds and interests arising from leaseholds. This absence of power confirms the case of *Powell* v. *Powell* discussed at page 34 of Petition.

Burnt record proceedings never were known at common law. Petitioners admit they are special statutory proceedings. The burnt record act nowhere mentions destruction of any leaseholds. On the contrary, partition writs at law existed at common law, and in Illinois until recently, January first 1950. Partition in Illinois now is regulated by statute, but the right precedes that regulation. Sections 27 and 28 of partition act, Chapter 106, pars. 70, 71. This law confirms suit in Superior Court at Cook County.

If the statement by Respondents is correct, that they cannot prove an ejectment suit; nevertheless that fact and inability does not create any right to maintain burnt record proceedings. The burnt record action is not any substitute for lack of proof in ejectment action.

IN CENTER

Since Respondents admit that suit to quiet or remove cloud from title, would not lie to affect the leasehold, as ruled by the *Hill* v. *Hinman* case, it follows that burnt record proceedings likewise are not usable for any such purpose. Thus in *Harms* v. *Coryell*, 177 Ill. 496 at 503 the opinion by Supreme Court of Illinois so rules:

> "The effect of such a decree (burnt record case) finding title to land in the petitioner against defendants is to settle the title between the parties as *effectively as though rendered on a bill to quiet title or remove a cloud from title.*"

Pleadings and motions by Mrs. Ellithorpe are sufficient demand for dismissal of all Burnt Record proceedings at bar.

As shown by abstract (49, 97, 100, 107 and elsewhere.) Ellithorpe by pleading, motion, and exception, demanded dismissal from the proceeding, for herself, Lake Dearborn Corporation, and stockholder interests, *after Petitioners joined issue in partition suit in Superior Court case.* Mrs. Ellithorpe has right and positive duty to defend and preserve the complete integrity of the Partition proceeding in the Superior Court. Mrs. Ellithorpe can not represent the other parties to partition but she must here preserve the right of all parties to be *heard* in that partition proceeding. (Pages 25-27 below.)

The plea in bar filed by Ellithorpe, based upon bankruptcy decree in 1936 (Abst. 37-38) and motion by her in support of same (Abst. 41) are in proper form under the rules of court. That plea in bar expressly states (Abst. 38-3):

> "From that decree on December 16, 1936, in cause 56924, no appeal nor review was ever taken. That

COPY BOUND CLOSE

> final decree remains in full force and effect. All parties to this present suit and their grantors and privies and all the property mentioned in this present suit were parties to that reorganization suit and all are bound thereby."

In view of that direct language, admitted by their motion to strike the plea the statements by Respondents in their brief, are directly contrary to the record. By their motion they admit the relevancy and effect of *Stoll* v. *Gottlieb*, 305 U.S. 165, to bar an action and suit at bar.

Especially the circuit court was wrong in failing to sustain the counter motion by Mrs. Ellithorpe (Abst. 41), asking to carry back to the burnt record petitions, the motion by the Petitioners to strike her plea in bar.

Furthermore by the case of *Gage* v. *DuPuy*, 127 Ill. 216, the Supreme Court of Illinois overruled the trial court and ruled for a dismissal in favor of the defendant, on a plea of statute of limitations, in a burnt record case. That case fully warrants a ruling by this court on present record to sustain the pleas of statutes of limitation by Mrs. Ellithorpe (Abst. 42, 48, 104, 106).

After the answer, *caveat* and cross-claim by Mrs. Ellithorpe were stricken from this litigation, by demand of Respondents, without prejudice to renewal in a separate litigation; none of the cooperative admissions made by that stricken pleading, were or are available on this record to aid Respondents or their decrees. That wrongful dismissal became and remains the law of this record. After such dismissal, the motions on this record by Mrs. Ellithorpe were and are unlimited by any admission by her whatever. Those motions were and are amply sufficient to overcome and destroy the pleadings by Respondents; and to warrant dismissal of these burnt record proceedings. This Supreme Court should so order.

E IN CENTER

Therefore Ellithorpe reaffirms her argument that under the constitutions, the decrees January 8, 1954 are void for want of adequate pleading by Petitioners. All pleas and motions by Ellithorpe for dismissal are valid and sufficient defenses. All defenses by Ellithorpe should have been sustained. Complete reversal should now be ordered.

III.

No foundation for judicial Notice.

If the court could take judicial notice of the Chicago Fire, for the purposes of a burnt record suit, it must also take judicial notice of every court house fire or other record burning in Illinois at any time.

The request by Petitioners for the Master to take judicial notice was objected to by Appellant, when made by counsel for Respondents (Abst. 187, 146, 102 and 104). That request was not supported by Respondents in any manner. No basis has been laid for judicial notice, beyond mere request to do so. Such request is not enough. *Shopleigh* v. *Mier,* 299 U.S. 468 at 475.

No basis for evidence for Respondents.

In *Harding* v. *Fuller,* 141 Ill. 308, the opinion reads (30 NE 1053 at 1055):

> "Upon the hearing the solicitor for petitioners made oath, as required by the statute, that the originals of the deeds and other documents in writing, and the records relating to the title of the said premises up to October, 1871, were lost, and destroyed by fire, and not within the power of petitioners to produce the same."

In the cases at bar no such basis was laid for any evidence at all. We mention this at pages 23, 25, 36, 37 of opening Petition. But Respondents fail to discuss the matter of this jurisdictional situation. Petitioner Ellithorpe never has waived her jurisdictional objections. (Abs. 150, 168-179).

COPY BOUND CLOSE

The current decision, *Thompson* appellee v. *McGruc* appellant; 3 Ill. 2nd 168, reversed judgment given for plaintiff based only upon pleadings; because *affirmative proof is jurisdictional.* Section 14 of the burnt record act demands "proof of the facts stated in the petition".

At page 187 of abstract the record shows that Eminent Counsel for Respondents stated he would have witness Farr to come to testify to certain matters which Counsel stated are jurisdictional. Mr. Farr was not again a witness. As matter of record, there is no pleading to lay a foundation for any such testimony or evidence for the Respondents. It thus appears that *the jurisdictional point has not been proven,* that none of the Respondents are free from fault as to any loss of records by fire or otherwise.

Therefore Ellithorpe reaffirms her petition page 35, that the decrees January 8, 1954 are void for want of adequate evidence to support any decree, and void for reliance upon judicial notice of events for which no foundation was laid.

Ellithorpe reasserts her Petition page 38, and especially calls attention to the following matters of confusion.

Consolidation Order.

The order for consolidation is expressly based upon the motion therefor and the affidavit therefor (Abst. 30-33). That order provides for immediate consolidation by these words: (June 17, 1947)

> "and *shall proceed as a single suit* to be designated hereafter by all pleadings, notices and orders as burnt record 1767" (Abst. 33).

The consolidation made both cases one. Whatever appears in the record of either is part of the whole case.

Shifting Contentions by Respondents.

Respondents now say that they made Mrs. Ellithorpe a party because of her *caveat* filed in recorders office of Cook County December 28, 1945, (page 22 of the Abstract). We ask the Court to read that entire document and to remember that after it was filed Respondents accepted deeds subject to leaseholds of record. (Abst. 106). That made Respondents to be *subsequent purchasers, subject to the leasehold and subject to the caveat.* (Abst. 32)

Generally speaking the Respondents do not openly question the statements nor the citations of authority mentioned by the Petition for Writ of Certiorari filed herein by Mrs. Ellithorpe. At page 9 Respondents evade frank admissions by these vague words:

> "The organization of petitioner's statement and argument is such that it is not feasible, or even possible, to answer her contentions in the order in which they are presented. Respondents will state and discuss what appear to be the principal contentions of Petitioner."

That mode of confusion violates the rules by which an Answer should proceed. The Petition follows the rules. Respondents should do likewise. Their method avoids direct admission, but Respondents do not actually deny the petition nor validity of citations made.

In fact parts of the Answer taken alone, confess error.

Thus at page 16 Respondents say:

> " * * *the final decrees specifically do not dispose of the only claim she ever asserted*—that is, that she had a lien against the property".

And at page 15 Respondents say:

> "Petitioner claimed a lien and, while Respondents contend the claim is without validity, the decrees ap-

COPY BOUND CLOSE

pealed from preserve whatever lien claim she may have".

And at page 8 Respondents say:

"The only claim Petitioner ever made with respect to the real estate described in the pleadings is that she had a lien against it. Respondents deny that she had any lien, but if she had one it is not affected by the decrees, which expressly preserved to her the right to establish a lien in some other proceeding if she can (Abstract 133). *Thus the decrees do not deprive Petitioner of any substantive rights she ever claimed.*"

And at page 5 Respondents say:

"Petitioner was served with summons in each case and in each case appeared and filed a pleading designated 'Answer and Cross-Petition for an accounting and Lien'. This pleading was stricken on motion of Petitioners because of the provision of the statute that liens and claims for liens cannot be disposed of in a Burnt Record proceeding and because an accounting is not germane to the petition. It should be noted that the final decree in each case (Abst. 133) contains the following language:

> 'Neither this proceeding nor this decree should in anywise affect any lien or liens or claim or claims for lien or an accounting in a separate and distinct proceeding to which the fee of the real estate hereinabove described may be subject, etc.'

In November 1947, Petitioner filed a suit in the Superior Court of Cook County for partition and an accounting (Abst. 122) and the Respondents and other defendants not parties to the Burnt Record proceedings filed answers. The abstract shows only the answers of certain defendants who were not parties to these present suits (Abst. 26). This Superior Court suit involves the same real estate as the instant case and is still pending and undisposed of."

IN CENTER

Unfortunately for all concerned, the logic of such admissions, is made a fog by other statements by Respondents in their Answer. There is no stability in any position taken by Respondents. For at pages 5, 10, 11, 15 and 16, Respondents say that the *caveat* was the reason to summon Ellithorpe. Thus at page 15 Respondents say:

> "It is clear that Petitioner recorded an instrument as a cloud on Respondents' title; that she was personally served and given an opportunity to support the claims set out in the recorded instrument. When her claim for lien was stricken, she made no other claim but filed the suit now pending in the Superior Court of Cook County. No federal question can arise from this situation."

No reference was made by Respondents at any time in the trial record, to the *Caveat* filed by Ellithorpe in the Recorder's office (Abst. 80). (*Caveat* is based on leasehold, which is not within meaning of the phrase "cloud on title"). Consequently the whole of that *caveat* is properly basis for the case *removed from this record* and now pending in the Superior Court. That is all the more true because the Respondents by their own motion stating—

> "4. This court has no jurisdiction in this proceeding to hear and determine any of the issues sought to be raised by *said pleading.*" (Abst. 26)

obtained in this Burnt Record suit an order (Abst. 34), which dismissed "said pleading", (the answer, *caveat* and cross-petition, presented herein by Ellithorpe), without prejudice to Ellithorpe pursuing same in another suit. (Abst. 34).

Petitioner submits that the effect of Respondents' failure (1) to mention or contest the *caveat* as fact anywhere in their trial court record, (2) plus their motion to dismiss

COPY BOUND CLOSE

without prejudice the pleading by Ellithorpe based upon said *caveat*, without prejudice to pursuing same in some other proceeding, (3) plus their answer filed in Superior Court (Abst. 50 and 206ff) renders all statements herein in this Court by Respondents about *caveat* or claims by Ellithorpe, as unfounded, and an attempt by Respondents to attack their own dismissal order, and a wrongful smear upon the suit Pending in the Superior Court. (Abst. 50)

Petitioner asks that all statements in this Court by Respondents about *caveat*, and all attempt by Respondents to limit in any way the completeness of suit in Superior Court, based upon leasehold and *caveat*, (Abst. 4) be disregarded by this Court as an unfounded attack upon said order for dismissal June 17, 1947. (Abst. 34)

Respondents did not mention nor refer to the *caveat* nor to any items therein stated, by any pleading, nor by the decrees which they had entered from which appeals are taken. If Respondents desired to affect or erase the *caveat* and its contents from the title, they had ample opportunity to plead, between 1945 when *caveat* was recorded and 1954 when Respondents entered these decrees. (Abst. 107-134)

The Burnt Record petitions filed January 21, 1947 in Cook Circuit Court by Respondents say this (Abst. 11):

> "And your petitioners (Respondents) expressly charge the fact to be that all such persons, if any there are, have not, nor has any of them, any right, title, or interest, *or lien upon said lands, or any part thereof.*"

And Mrs. Ellithorpe upon receipt of summons, challenged that statement and the petitions generally, by her answer and cross petition (Abst. 15-25) filed February 24, 1947, as permitted by statute, chapter 116 par 17 (13). By her prayer to that answer and cross-claim she asked that (Abst. 21):

N CENTER

> "All parties to this proceeding shall make answer to this cross-petition, that this claim for lien be heard and awarded to her; that she may have complete discovery as to all matters herein mentioned; and that she may recover the same by personal judgment, and by decree of foreclosure or other appropriate relief in this court".

Ellithorpe asks that the Court will read that pleading in entirety.

The motion by Respondents to "strike and dismiss" said answer and cross-claim (Abst. 26), *made no reference to any statute,* but Respondents by their motion did say: (Abst. 26):

> " This court has no jurisdiction *in this proceeding* to hear and determine any of the issues sought to be raised by said pleading."

and Respondents presented the order by which the court (Abst. 34):

> "doth find that the said motion should be allowed" and without prejudice said answer and cross-claim, "is hereby dismissed as to said plaintiffs and counter-defendants" (burnt record petitioners now Respondents).

If as Respondents now say, the *caveat* was their reason for serving Mrs. Ellithorpe with summons, why did they not also serve with summons, Lake Dearborn Corporation and all other stockholders, *whose interests are equally established by that caveat?* (Page 18 above.)

And why did Respondents as above shown, at once contend by their motion that the *caveat* and pleading thereon must be dismissed, without prejudice to action in another suit and court?

And why did Respondents as defendants in that removed suit in Superior Court, filed by Mrs. Ellithorpe after such

COPY BOUND CLOSE

forced dismissal, take issue by their answers to subject matter of *caveat* and leasehold (Abst. 50 and 205-228)? That new suit proceeds against the same real estate, and against Respondents on this record, as defendants there as owners of the reversion (Abst. 222) and that pleading at paragraph 23 asks for a lien against the reversion, to answer us orally by former stockholders.

And how could Respondents now contend that the leasehold comes within the scope of the decrees at bar, wholly contrary to their motion above quoted and the dismissal orders? Reversals of positions by Respondents are confusion after confusions. (Page 22 above.)

Since the factual matters making up her *caveat*, answer and cross-claim in this case were stricken and dismissed without prejudice, and all were taken to Superior Court (Abst. 15-25, 26, 34, 49-50, 206-232) the request by Respondents after such events, that such factual matters be pleaded again in the burnt record suits (their brief 15) is mere absurdity and facetious conduct. Respondents continue after decree, further harassment against Mrs. Ellithorpe.

Sham, Fraud and Evasion.

Respondents say these are harsh words. They are just that. But they are modest in comparison with the misconduct by Respondents in managing this litigation (Petition page 53ff), and in entering such decrees, and their devious argument used for defending against appeal.

The only continuity of purpose and performance, shown on this record by Respondents, is their potent desire to confiscate the more than a million dollar improvements made by Lake Dearborn Corporation with money from the stockholders, upon the leasehold property and estate; and the desire of Respondents to do that without payment to anyone; without pleading the existence of said leasehold

IN CENTER

and improvements, without any evidence about the leasehold matters; and without telling any court about the plans and intentions of Respondents (Petition pages 53ff.) The Burnt Record suits are shams. (Petition Pages 27, 29)

By evasion and fraudulent pleading, Petitioners seek confiscation of leaseholds and rentals, by delays: *Weber* v. *Mick*, 131 Ill. 520, 23 NE 646 at 649: *Sherwin-Williams* v. *Watson*, 361 Ill. 599 at 605; 198 NE 2d at 707.

Custody by Respondents of leasehold property (begun during World War II and continued during and since Korean war period) arose and continues only as custodian for Mrs. Ellithorpe and Stockholders.

The solid fact is that any possession by Respondents arose and continues under "Dearborn-Lake Rent Assignment" (Abst. 231), which they received from Lake Dearborn Corporation in 1942 (Abst. 19, 208, 219-21, 231-232 and Petition page 53ff). Their possession is that of fiduciary under said assignment of rents, which recognize the validity of the leaseholds and all the leasehold property. The record establishes that trust as continuing, for benefit of Mrs. Ellithorpe and all other beneficiaries of leasehold. Under said rent assignments, Respondents not only performed duties as management agents for said beneficiaries, but they paid certain corporate expenses of Lake Dearborn Corporation during 1943-1944 (Abst. 230-232), out of the rents so collected by them as trustees (Petition page 53ff). This is shown by their said accounting rendered at that time. No act is shown by Respondents to divest themselves of said fiduciary relation and trusteeship under said rent assignments. (Petition page 54)

Where fiduciary relation has been shown, the burden lies upon the fiduciary trustee to plead and prove fair-

COPY BOUND CLOSE

ness in termination thereof. All presumptions are against such trustee, who must establish the contrary. In that situation *Tanner* v. *Tanner*, 326 Ill. 302, rules as follows:

> "Decrees in chancery must be based upon the record in the case, and not upon assumptions of counsel differing therefrom, and if the decree contains recitals which are not supported by the record, such recitals must be disregarded." 157 NE 164.

The burnt record decrees lack record support to meet the rule of that decision. *Ambrosius* v. *Katz*, 2 Ill. 2d 173, 181.

Factual Pleas by Ellithorpe.

Contrary to frequent statements throughout Respondents' Answer, Mrs. Ellithorpe did file and now continues on these appeals to assert, various later pleadings in the burnt record suits (Abst. 37, 41, 42, 45, 48, 60, and 96). All factual matter thereby used as defense herein, the Respondents have admitted to be true for purposes of this record, by their motions to strike which were sustained by the trial judges (Abst. 26, 40, 43, 62, 84 and 97). Those factual matters establish former adjudication, estoppel by limitation, estoppel by laches and want of jurisdiction, and want of equity for chancery jurisdiction. This court on appeal should reverse the orders, should sustain all those pleading contentions by Mrs. Ellithorpe. This Court should dismiss these burnt record proceedings, as prayed by all those pleadings (Petition page 50).

Contrary to statements in Respondents' Answer, the record shows adequately there are more than 800 stockholders who were never served and never notified about this suit (Abst. 46, 101 and 153). Above pages 7, 8.

The theory of Respondents that they can claim against 800 other people, but serve with summons only Mrs. Elli-

CENTER

thorpe, violates the basic rule of law decided by *Giese* v. *Terry* and other cases (Page 31 Petition).

Frequently the brief for Respondents says that Ellithorpe misconstrues or misunderstands the meaning and effect of the record. But they never point out how or wherein such statements are true. Many bold statements are made by that brief, which are not referred to any part of the record, and are wholly contrary to the record.

V.

At several places in their brief Respondents give names to pleadings and then argue against the pleadings, using words that define the names in a narrow and misleading manner. The whole purpose of pleading is to state facts, and the facts so stated are the only measure of the rights thereby asserted. Our courts of record adjudicate upon the facts pleaded and the facts proven—both are necessary basis to arrive at a decree. Neither the names of pleadings nor the relief asked can control the action of the court upon the pleading and the evidence.

Respondents' false argument about lien.

Request for a lien is request for one form of remedy. A lien is not a cause of action but a method of satisfaction. You ask for a lien as you ask for any manner of writ or relief. A proper objection to lien is like proper objection to a writ. The objection is not a cause of action, but to manner of relief. Eminent opposing counsel made the huge mistake of moving to strike and dismiss the entire cause of action set forth by Mrs. Ellithorpe by her *caveat*, answer and cross-claim, without prejudice to renewal which has been accomplished by the suit in Superior Court. That action by said Counsel is not supported by the statute as

COPY BOUND CLOSE

to lien, which would have been executed by a motion to deny writ of lien. Having made the foolish motion and causing confusion to all concerned, they now contend that only the relief of lien was moved out of this case. That contention is utterly facetious in view of the sweeping motion which they made and carried into order June 17, 1947 (Abst. 26, 34-35). The order was wrong, but all parties carried it to full execution (Abst. 206-232), by the new suit in the Superior Court of Cook County, which remains pending and unheard. (Abst. 50)

Respondents have taken issue re leaseholds in Superior Court (Abst. 50 and 206ff) and Appellant filed her reply thereto, in the Superior Court of Cook County. (Answer herein by Respondents at page 5).

As shown above at page 25 the burnt record petitions by positive denial of *lien,* and by summons served upon Mrs. Ellithorpe, compelled her to come into the burnt record litigation, and there assert her claim for lien along with other claim for relief, upon the factual matters set forth by *caveat* and her pleading thereon. Respondents then did a somersault and repudiated their own pleading petition against *lien.* However Respondents instead of limited motion to refuse lien relief, under section 34 of civil practice act, Respondents demanded dismissal of all claim and pleading by Mrs. Ellithorpe under her *caveat,* without prejudice to her pleading same in another separate litigation. That motion and order were unfounded, but the opposition of Mrs. Ellithorpe was overruled and the order entered, *effecting a severance and divestitute of jurisdiction as to all matters of caveat, answer and cross-claim pleadings.* (Petition at pages 40-42.)

Later Respondents repented of their rash action. They now urge that Mrs. Ellithorpe should have repleaded said

matters in the circuit court, after they had taken issue on them in superior court. As shown above Respondents have shown repeated instability, by reversal of position, repeatedly for seeming momentary advantage. If the confusion were not tragic, their reversals of positions would be ludicrous.

By her answer and *caveat* and cross-claim, Mrs. Ellithorpe sought to make general and vigorous defense to Burnt Record proceedings. For example (Abst. 19):

> "Your defendant and counterclaimant denies expressly, all part of said (burnt record) petitions which may be in conflict herewith; specifically she denies that paragraphs third, fifth, seventh, eighth, and ninth of said petitions are true, against her or against her claims herein made."

The heart of that pleading by Mrs. Ellithorpe in circuit court in burnt record proceedings (Abst. 18-19), and likewise the heart of her suit in superior court (Abst. 219-221), are the same, namely—leasehold interests, stockholders as beneficiaries, and fiduciary relations and duties of Respondents as reversioners, who are in control of said real estate as assignees for rentals for conversation and accounting to Mrs. Ellithorpe and stockholders, who are owners of leasehold as tenants in common as successors to the defunct Lake Dearborn Corporation. The specific relief asked by partition which is pending in superior court suit, is not about different subject matter, nor outside the *general relief* which was asked in circuit court by Mrs. Ellithorpe in burnt record proceedings. (Abst. 21)

Respondents by their answers in superior court, (Abst. 50 etc.) have raised issues about leaseholds and successor stockholders as their beneficiaries, and relief flowing from the rental assignments. Thereby Respondents by their

COPY BOUND CLOSE

own action then established and admitted as early as 1947, that the leasehold and subsequent issues had been removed from burnt record litigation to become pending in superior court. And Mrs. Ellithorpe filed her reply in superior court, to close those issues in that court; where they remain pending and unheard. (Abst. 50: Answer Brief by Respondents at page 6)

Larson v. *Johnson,* 1 Ill. App. 2d 36 at 39.

Wherefore Ellithorpe reaffirms her Petition, and reasserts that under said constitutions, the decrees January 8, 1954 are void because contrary to *res judicata* order of severance and divestiture of jurisdiction of subject matter removed by that order, June 17, 1947, which excluded leasehold. (Abst. 34)

Summary and Conclusion.

Petitioner submits she has established that:

1. By the record and decisions she has shown denial to her of an orderly proceeding, contrary to due process of law and equal protection of law, as provided by the constitutions of Illinois and the United States of America.

2. By supreme court decisions Mrs. Ellithorpe has shown and established her right as summoned defendant, to have all named defendants and all necessary parties, likewise summoned and served with court process in a constitutional manner, before hearing and decrees could proceed on this record.

3. Mrs. Ellithorpe thruout the record has stood upon and stated her constitutional objections, timely made and frequently repeated, before the Master and the circuit court. She repeats them on appeal.

4. The leasehold matters were not made part of the burnt record litigation at any time, and remain outside

IN CENTER

any action by decrees. The contrary contention by Petitioners is added wilful wrong.

5. The leasehold matters are being litigated in case 47S18083 in superior court of Cook county, upon adequate pleadings.

The parties to that litigation include Respondents at bar, and all stockholders of former defunct Lake Dearborn Corporation, and the real estate described by the decree in this Burnt Record litigation.

6. As to said leasehold matters, said suit in superior court, has precedence over this burnt record litigation, by order from circuit court on this record June 17, 1947, requested by Respondents. The Respondents are estopped by their own conduct on this record.

7. If Respondents as they say on appeal for *the first time on record* made Mrs. Ellithorpe a party because of her *caveat* about leaseholds and Lake Dearborn Corporation, which she filed on December 28, 1945 in the recorders office of Cook County, said Respondents have repudiated and abandoned that purpose, by their motion to strike and dismiss Ellithorpe pleadings based upon that *caveat* as exhibit A and leasehold matters, and Respondents have fully confirmed that repudiation and abandonment by filing their answers in writing to her separate suit on those leaseholds and subject matter of that *caveat* about leaseholds and Lake Dearborn Corporation, in case 47S18083 in superior court of Cook County.

8. After such repudiation and abandonment of leasehold subject matters by Respondents, it was inequitable persecution and wilful abuse of court process, for Petitioners to pretend that Mrs. Ellithorpe and Lake Dearborn Corporation and its successor stockholders, could be or remain proper or necessary parties to such burnt record

COPY BOUND CLOSE

litigation. It became unconscionable wrong for Respondents to refuse the demand then made against them on this record, that the burnt record litigation must be dismissed as against Mrs. Ellithorpe, Lake Dearborn Corporation and all stockholders as successors of that corporation.

9. The record shows that Respondents have used devious shifts and changes of position to remain in court, and now have no pleadings and no rational basis and no supporting evidence left, to sustain their decrees, brought here by these appeals.

10. The record shows that the value of Respondents land reversion, is small in relation to value of 99-year leasehold and 12 story modern commercial building improvements, paid for and constructed by money from shareholders of Lake Dearborn Corporation. For that alone, the burnt record litigation should be dismissed with all costs assessed against the Respondents.

Federal Questions Established.

Petitioner Ellithorpe reasserts her Petition as follows: The Petition and record shows denial of due process and denial of equal protection of law and denial of equal and fair administration of constitutions and the laws above stated. A decree of United States District Court in reorganization case upon which Ellithorpe relied in making her investment, has been ignored and refused enforcement. Statutes of limitation have been ignored and refused enforcement, altho currently enforced in favor of other litigants as shown by the Petition. Contrary to statute, the Supreme Court of Illinois failed and refused to render opinions, and refused to allow filing of Petition for Rehearing, permitted for all persons for whom opinions are written. The Appellate Court of Illinois files cryptic opin-

N CENTER

ion, refusing to discuss questions presented raising issues under the constitutions of Illinois and of the United States, although the Supreme Court of Illinois holds invalid in a current case another statute adverse to Article VI of the Constitution of the United States. Other unconstitutional denials to Ellithorpe are set forth at page 50 of Petition herein filed. All the foregoing violated the rights of Petitioner under the provisions of Constitutions set forth at Appendix D to her Petition.

All of these federal and constitutional and jurisdictional questions, were ignored by the Circuit Court of Cook County, and also were ignored by the Supreme Court of Illinois. Those courts did not file opinions. See Petition pages 2 and 43. Likewise those basic questions and issues were ignored expressly by Opinion of the Appellate Court of Illinois, See pages 43, 59 of Petition for Certiorari. Each of said Courts of Illinois, failed and refused to perform its duty under Article VI of the Constitution of the United States. See Petition at pages 42-44.

The shifting contentions by Respondents and their repeated instability of position on the record, compel this appeal by Ellithorpe for review before Youor Honors. See above, especially at pages 22 ff.

THE AMERICAN IDEA, a July Fourth Editorial (July 3, 1956), in the Wall Street Journal, quotes John Adams, a Founder, as follows:

> "The moment the idea is admitted into society that property is not as sacred as the law of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence".

COPY BOUND CLOSE

Schuyler County v. *Missouri Bridge Company*, 256 Ill. 348 at 352, corrects the citation made at page 40 of Petition.

This No. 148 October Term 1956, is the same as No. 1013 to the October Term 1955 of this Court.

Petitioner again urges that her Petition for Certiorari shall be granted; and that writ be issued for full hearing in this Court upon the record.

Respectfully submitted,

WEIGHTSILL WOODS,
53 West Jackson Blvd.,
Chicago 4, Illinois.
Attorney for Petitioner,
Evelyn Pratt Ellithorpe.

N CENTER